IN THE COURT OF APPEAL
CRIMINAL DIVISION

Neutral Citation Number: [2024] EWCA Crim 669
Case No: 2023/02172/A1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 6th June 2024

B e f o r e:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE LAVENDER

SIR GARY HICKINBOTTOM

R E X

- v -

MARK GOULD

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Mr R Bowers KC and Mr M Dacey appeared on behalf of the Applicant

Mr D Groome appeared on behalf of the Crown

J U D G M E N T

Thursday 6th June 2024

LORD JUSTICE WILLIAM DAVIS:

1. On 30th May 2023 in the Crown Court at Birmingham, Mark Gould was sentenced to a total of 11 years' imprisonment. The sentence was made up of three separate sentences which were ordered to run consecutively. On count 1 (conspiracy to defraud) the sentence was six years' imprisonment. On count 2 (conspiracy to defraud) the sentence was four years and two months' imprisonment. Gould had pleaded guilty to those counts in January 2023, when the indictment was listed for trial. That was the third listing of the case; two earlier trial dates had been vacated due to the pandemic and lack of court availability. For contempt of court, namely contravention of a Restraint Order, the sentence was ten months' imprisonment. Gould had admitted the contempt in August 2021.

2. Gould applied for leave to appeal against his sentence. He was entitled to appeal as of right against the sentence imposed for contempt, by virtue of section 13 of the Administration of Justice Act 1960. However, he was required to exercise that right within 28 days of the imposition of the sentence. His application was made three days out of time. The single judge refused to extend time on the basis that there was no merit in the grounds of appeal. Gould's solicitors have explained that the grounds of appeal drafted by counsel were ready in good time to be discussed with Gould prior to them being lodged with the court. However, Gould was unexpectedly transferred to a different prison shortly before the planned discussion. That resulted in a short delay. We consider that an extension of time of three days is appropriate, given the circumstances of the delay. That extension of time means that we are required to consider the sentence for contempt on its merits. The application for leave to appeal against the sentences imposed in relation to the offences of conspiracy to defraud is renewed. We shall consider that application on its substantive merits.

3. For ease of reference we shall refer to Gould as the appellant. He is represented by Rupert Bowers KC and Mark Dacey. Mr Dacey appeared at the Crown Court; Mr Bowers did not (at least not at the point of sentence). The respondent prosecutor is represented by David Groome, who prosecuted the case in the Crown Court. We are grateful to all for their written and oral submissions.

4. In August 2016, the appellant set up a streaming service accessible via the internet. It was called Flawless Hosting. That service, and successor services which operated from July 2018, were engines of fraud. The appellant had two partners, named Gordon and Jolley, when the service was first set up. Shortly thereafter, a man named Felvus joined them. In January 2018, a man called Brown became involved. All of these men were prosecuted along with the appellant. All were ordered to serve differing terms of imprisonment. It is not necessary for us to set out those sentences. A ground of appeal relating to disparity is no longer pursued.

5. Count 1 on the indictment related to the period from August 2016 to May 2018. The relevant particulars of the offence were in these terms:

> "… between the 15th day of August 2016 and the 23rd May 2018 conspired to defraud the broadcasters of Pay TV services, the Football Association Premier League and such other persons as have an interest in the content of pay-tv, by supplying services in the name of Flawless Hosting that enabled pay-tv services to be viewed without the consent of and/or without appropriate payment to the said broadcasters and persons having an interest in the content of those broadcasts."

6. Flawless Hosting copied, or otherwise unlawfully obtained the content of, pay-tv broadcasts made for subscribers to legitimate providers, both in the United Kingdom and in other English speaking countries around the world. The unlawfully obtained content was

then provided by an internet streaming service to customers of Flawless Hosting. The customers were mainly based in the UK, though the service also had customers in the United States, Australia and Ireland.

7. Customers of the streaming service would pay £6 or £10 a month, depending on whether they purchased material directly from the streaming service or via a re-seller. At any one time the service would have been received by up to 60,000 subscribers. In the period August 2016 to May 2018, Flawless received approximately £4.6 million from its direct customers. The overall cost to Flawless for providing the streaming service was of the order of £800,000, leaving £3.7 million to be shared between the conspirators. The appellant's share was £1.7 million.

8. Flawless' receipts represented 460,000 subscribed months. Flawless provided access, *inter alia*, to the great majority of Sky channels and BT channels. Legitimate subscription to those channels taken together would have been over £80 a month during that period. Had the Flawless customers obtained the material legitimately from the legitimate providers, the subscription income to Sky and BT would have been in excess of £37 million.

9. The appellant took the leading role in the organisation and running of Flawless. He made all of the strategic business decisions; he was solely responsible for the finances of the enterprise; he set up and ran the PayPal account which received payments from customers; he played a significant part in obtaining content from outside providers; he was personally responsible for copying Sky content, whether via satellite or from the internet. When his home was searched in May 2018 he had 20 set-top boxes and nine computers which he used in the copying process.

10. Flawless did not consist merely of two or three conspirators acting together. The outfit

employed some 25 people at any one time to administer the service on a round-the-clock basis and to moderate a support group on Facebook. So far as customers were concerned, the service was intended to operate in much the same manner as a legitimate broadcaster.

11. The conspiracy charged in count 1 in calendar terms came to an end with the arrest of the applicant in May 2018. His copying equipment was seized.

12. Count 2 charged a similar conspiracy. The particulars of the offence were in the same terms that we have rehearsed for count 1. The period to which that count related began in May 2018 and continued until July 2021. For a short period, Flawless continued to operate just as it had before. At the appellant's direction, Felvus took on the task of copying content. However, this way of operating ceased in July 2018. Rather the appellant, with the technical assistance of Brown, was able to change the system so that customers only bought services via re-sellers. UK channels were obtained from outside providers. The business changed its name, first to Shared Servers and then to Shared VPS. A new PayPal account was set up in the name of a Hungarian national. Customers would pay into that account, which was under the control of the appellant.

13. Between June 2018 and July 2021, the turnover of the streaming service which succeeded Flawless (whether it was named Shared Servers or Shared VPS) was around £2.6 million. Those receipts represented some 430,000 subscribed months. The receipts per customer were less than when Flawless had been operating, because the successor service took a significant part of its income in Bitcoin. Customers who paid in Bitcoin were given a discount. In addition, the cost of legitimate subscriptions to Sky and BT fell over this period. Had the services obtained unlawfully during this period been obtained legitimately, the cost to subscribers would have been in excess of £29 million.

14. How Flawless and its successor streaming services obtained the content which they then provided to their customers was technically sophisticated. Moreover, as legitimate providers of material realised that their copyright was being compromised, they would take steps to protect their content. The appellant and his co-accused were able to manipulate their activity so as to defeat the efforts of legitimate providers to prevent unlawful streaming of their content. We understand that the prosecution of this case was, at least in part, funded by the English Premier League. That may be because one important aspect of the content provided by Flawless was the showing of Premier League matches played on a Saturday afternoon. Legitimate broadcasters were, and are, unable to transmit such matches live because of the rules of the various football authorities. Those rules are in place to promote attendance at matches and participation at grassroots level.

15. In 2016 the Premier League obtained injunctive relief against major UK internet service providers to block access by their customers to servers identified as providing illicit streaming of matches. That clearly would have affected Flawless and its successors. However, by various sophisticated means those services were able to avoid the impact of the injunction.

16. The Restraint Order breached by the appellant was imposed following his first arrest in May 2018. Between then and June 2020 the appellant breached the order. First by failing to disclose accounts, two of which he set up after the making of the Order. Second, by dissipating funds in excess of the £250 a week permitted under the Order for his living expenses. He had continued to dissipate his assets even after he had been summonsed for initial breaches of the Order. The total amount dissipated in breach of the Order was £181,838.28. This figure was set out in a basis of plea, which was agreed.

17. We have dealt in relatively summary form with the mechanism of the fraudulent activity

led by the appellant. One of the co-accused, Brown, was tried by a jury. The trial occupied approximately four weeks.

18. The prosecution opening for sentence ran to over 70 pages of detailed explanation of the frauds and the parts played by each accused. It is unnecessary for our purposes to delve into the detail. The appellant accepted that he fell to be sentenced on the case as set out in the prosecution opening.

19. In sentencing, the judge set out the factual background as we have rehearsed it. He considered the Sentencing Council guideline for conspiracy to defraud. In relation to the appellant, he concluded that culpability was high. The appellant played a leading role, where offending was part of a group activity. The nature of the offence was sophisticated, accompanied with significant planning. The fraudulent activity was conducted over a sustained period of time.

20. In relation to each conspiracy the judge found that harm fell into category 1. The financial loss caused or intended, in the judge's view, was far in excess of £1 million in each case (the figure upon which a starting point for category 1 is calculated). The judge adopted the figures we have set out above (a) for the profits made by the appellant and his co-accused, and (b) for the value of the subscriptions, had the customers obtained the content from legitimate broadcasters. He rejected the argument advanced that the broadcasters had lost little or nothing because customers of Flawless and its successor services would never have subscribed to Sky or other like providers. The judge said this:

> "It seems to me that the loss in this case, as contended for by the prosecution, is the value of these illicit subscriptions if bought legitimately. The value of a commodity or service is what an arm's length purchaser will pay to receive it lawfully. Stolen gold may be worth less than legally acquired gold and

> someone prepared to pay the price of stolen gold may not be prepared or able to pay the price of lawfully acquired gold. That does not mean that the value of lawfully acquired gold is less than the market dictates. If everyone were able to stream international top rank sport for £10 a month, nobody would pay £60 or £80 to do so. The business models of the broadcasters and the content owners would then collapse. The parasite would kill the host."

21. The judge relied on a passage in *R v Rose* [2008] 1 WLR 2113 to support his analysis. By that route, he found that the losses were tens of millions of pounds.

22. The judge accepted that there was mitigation available to the appellant. He was a man in his late 30s, of effectively good character. Psychiatric evidence showed that he suffered from a mild borderline personality disorder and mild Obsessive Compulsive Disorder. The judge indicated that he had had regard in that respect to the Sentencing Council guideline for sentencing persons with a mental disorder. In particular he accepted that prison would be more onerous for the appellant as a result. He also paid some regard to the delay which had occurred, albeit that much of that was due to the very late tendering of guilty pleas by the appellant.

23. The judge concluded that the sentence after a trial for each conspiracy would have been eight years' imprisonment. The starting point in the guideline for a category 1A conspiracy was seven years' custody, with a category range of five to eight years. The multiplicity of high culpability factors, and the financial harm, meant that the proper sentence after a trial was at the top of the category range.

24. The judge describe the contempt as being "as bad as it gets". Had the contempt not been admitted, the sentence would have been 21 months' imprisonment. The judge reduced the sentence in relation to each conspiracy by 12 months to take account of mitigation. He

reduced the sentence on count 1 by 14 per cent for the plea of guilty, and by 15 per cent in relation to count 2. He determined that all sentences properly should run consecutively. He calculated that, without adjustment, that would have led to an overall sentence in excess of 13 years' imprisonment. The judge said that that would not have resulted in a just and proportionate sentence. He reduced the sentences in relation to count 2 and the contempt in order to achieve the overall sentence he imposed, namely 11 years' imprisonment.

25. The core argument advanced on behalf of the appellant is that the overall sentence was simply too long for the type of criminality in which the appellant engaged. Moreover, it exceeded the maximum sentence for a single offence of conspiracy to defraud. This was not a case in which there was any victim impact of the kind referred to in the guideline, requiring an upward adjustment to the sentence. In essence, the judge's sentence after trial left little headroom for what would be a much more serious case with really very significant impact on victims.

26. That broad proposition was supported in written grounds by particular arguments. However, it is not necessary for us to refer to the written grounds because Mr Bowers has concentrated on two specific submissions. It is those submissions with which we shall deal.

27. Mr Bowers deals, first, in his written submission (though he dealt with it second in oral argument) with the calculation of loss, which he argues was wrong in principle. For an offence of conspiracy to defraud to be made out, the prosecution had to prove that a proprietary right had been injured or potentially injured. Mr Bowers referred to *R v Barton and Another* [2020] EWCA Crim 575 at [117] to [126] in order to establish that proposition. On the evidence available to the judge, he argued, it was impossible to engage in proper scrutiny of the contractual arrangements as between those who produced and/or owned content, and those who broadcast it. As a result, it was impossible to calculate loss. Mr

Bowers submits that the judge relied on irrelevant matters: it was irrelevant how much gain the appellant had made; it was irrelevant how much legitimate subscriptions to the pay-tv providers amounted to. They could have no connection to the injury to proprietary rights. The only safe course was to say that there was a risk of loss. In oral argument the court tried to identify with Mr Bowers what loss was risked. He was prepared to concede that it would be a risk of loss that would have reduced the categorisation of harm to category 2.

28. The second argument advanced by Mr Bowers (the first orally) was that the mere fact that there were two counts did not mean that there were two separate criminal agreements. There was a single course of criminal conduct. The method may have evolved, but the conduct was the same throughout. In those circumstances, proper application of the Sentencing Council Totality Guideline would have resulted in concurrent sentences. Mr Bowers relies on the passage in the guideline which reads:

> "Concurrent sentences will ordinarily be appropriate where offences arise out of the same incidents or facts."

29. In relation to the issue of loss, the judge had relied on what had been said in *Rose* in the context of confiscation proceedings. In the written Grounds of Appeal that reliance was criticised on the basis that the Supreme Court in *R v Waya* [2012] UKSC 51 disapproved the approach taken in *Rose*. In our judgment, the judge did not fall into errer. *Waya* disapproved of one aspect of the judgment in *Rose*, but at [68] expressly approved the approach to valuing a loss in the context of confiscation as follows:

> "… *Rose* and *Ascroft* are correct in holding that the measure of the value of the interest in property stolen to the thief, for the purposes of confiscation, is what it would cost him to acquire it in the open market."

30. We accept, as Mr Bowers submits, that the issue of the value of property to a thief in the context of confiscation proceedings is not the same as the loss caused by fraudulent activity. Nonetheless, we consider that there is some parallel to be drawn. Adopting the judge's approach to the calculation of loss, whilst it could not be said that every customer of the appellant's fraudulent enterprise would have subscribed to the legitimate broadcasters' output, it would be reasonable to conclude that at least a significant number would have done so, if that had been the only option. As the judge observed, a principal attraction of providers such as Sky is the access to sporting events. The appellant's primary selling point to his customers was precisely that kind of access. Even if one were to take the loss to legitimate broadcasters of 50 per cent of the sums to which we have already been referred, that would still mean a loss in excess of £30 million, namely far in excess of the starting point of £1 million in the guideline for category 1 harm.

31. It is apposite to consider what is said in the guideline about risked loss. The relevant part of the rubric reads as follows:

> "Where the offence has caused risk of loss, but no, or much less actual loss, the normal approach is to move down to the corresponding point in the next category. **This may not be appropriate if either the likelihood or extent of risked loss is particularly high**."

If this were a case where a risked loss approach ought to have been taken, we consider that it is quite unrealistic to categorise that loss as notional. The guideline refers to the likelihood or extent of the risked loss. In our judgment, the extent of that risked loss in this case was so high that moving down a category would not have been appropriate.

32. Mr Bowers' submissions to us very much concentrated on the proposition that conspiracy

to defraud requires injury to proprietary rights. That proposition is drawn from what Viscount Dilhorne said in *R v Scott* [1975] AC 819 at 840. In our view, applying what Viscount Dilhorne said in strict terms provides too narrow a basis for defining the offence of conspiracy to defraud. *Scott* has been considered more than once since 1975. We find assistance in what Davis LJ said in *R v H* [2015] EWCA Crim 46 at [33]:

> "Assuming that a proprietary right or proprietary interest of the kind connoted by Viscount Dilhorne is required, one still has to consider what that phrase was intended to mean. It is a phrase constructed by judges for the purposes of setting the common law. There is no applicable statutory definition. If one were to refer by analogy to section 4 of the Theft Act, or section 5 of the Fraud Act, the notion of property for those statutory purposes can be very broad indeed. As we see it, there at all events can be no reason whatsoever to confine Viscount Dilhorne's reference to proprietary right to the notion of beneficial or equitable interest, or, for example, the kind of interest which needs to be shown to launch a claim for an equitable tracing remedy. No right in rem as such needs to be shown for these purposes. There is no principal reason why it should be."

33. The submission advanced that no proper scrutiny could be made of the contractual arrangements between the various parties with an interest in the broadcast material on the basis of the evidence served in this case may well be correct. That does not mean that the judge erred when he used the value of legitimate subscription income as a means of assessing loss. This was not assessing it strictly by reference to civil law, but as an indication of the loss caused and risked. We deprecate the introduction of contractual and copyright technicalities into the criminal law.

34. We also consider that the appellant's submissions on loss fail to grapple with an alternative route to the consideration of loss. The question can be posed: how much would Flawless have had to pay legitimate broadcasters had they negotiated a deal to do lawfully what they actually did unlawfully? The answer must be something close to what the

broadcasters charged their other customers. The business model of Flawless and their successors involved breaching the copyright of the legitimate broadcasters. In practical terms they stole the product of those broadcasters. No further technical analysis is required.

35. What of the argument that it was wrong in principle to impose consecutive sentences in relation to the two counts of conspiracy to defraud? We consider that the totality guideline issued by the Sentencing Council of itself does not assist the appellant's argument. Consecutive sentences will be appropriate where "offences are of the same or similar kind, but the overall criminality will not sufficiently be reflected by concurrent sentences".

36. In *R v Fletcher* [2024] 1 WLR 1433, the court was concerned with a website from which software was supplied through which fraudsters could commit fraud. One count on the indictment concerned the setting up of the website. A second count related to promoting and facilitating use of the website. The two counts were two sides of the same coin. It was argued that they arose out of the same facts, so that consecutive sentences would be inappropriate. This court rejected that argument. Amongst other matters, the court accepted that the overall criminality, which in that case involved frauds within this jurisdiction exceeding £43 million, could not be sufficiently reflected by concurrent sentences. *Fletcher* cited *R v Schools* [2023] EWCA Crim 422. The appellant in that case had engaged in investment fraud between 2009 and 2012. The *modus operandi* of the fraud remained the same throughout. However, early in 2012 he changed the corporate vehicle he used to conduct the fraudulent activity. The appellant was charged in separate counts. The trial judge imposed consecutive sentences, which led to a sentence substantially in excess of the statutory maximum for the individual offences charged. That course was upheld by this court because the overall criminality would not have been sufficiently reflected by the imposition of concurrent sentences.

37. The way in which Mr Bowers presented the case to us today was that, although there were two separate counts charging conspiracy to defraud at different dates and with difference participants, in fact there was only one conspiracy. He relies on what was said when the prosecution applied to amend the indictment by adding a second count. Amongst other things, the written submissions said as follows:

> "… the proposed amendment gives rise to no improper prejudice/injustice for the following reasons:
>
> (a) … The … evidence does no more than take the existing case forward by providing additional evidence concerning this continued offending and by extending the period of that additional offending.
>
> …
>
> (d) The proposed amendment does not add a 'new' allegation …
>
> …
>
> (f) If [the appellant] is convicted on the proposed count 2 any prejudice which arises from the risk of an increased sentence is not improper since it will have been occasioned by [the appellant's] decision to continue offending."

38. Mr Bowers argues that the prosecution thereby accepted that there was a single conspiracy and that it would be wrong in principle thereafter to use the fact that there were two counts charging separate agreements to justify consecutive sentences.

39. On the facts, we are satisfied that there was a clear distinction between the way in which the appellant operated prior to his arrest in 2018 and how the fraudulent activity was conducted once the names of the internet streaming services were changed. We have described the differences in which the two agreements operated. Mr Bowers says that that is

merely a question of a different method. That may be so, but that is an indication that it was separate, albeit similar, activity. The single judge said that the offending after the middle of 2018 was "separate and distinct" from the earlier offending. Whether that was putting it too high matters not. The reality is that on the evidence there were two separate kinds of offending, albeit aimed at the same end.

40. Mr Groome, who prosecuted the case in the court below, has explained that the way in which the case was put in January 2022, when the indictment was amended, changed quite dramatically in January 2023, before the appellant pleaded guilty, with the service of evidence which demonstrated precisely how it was that the successor streaming services to Flawless were run quite deliberately in a different way to Flawless.

41. Of course this was a single piece of fraudulent activity by the appellant in that what he sought to do was the same throughout. But the fact that he did it in a different way and with different people, in our judgment, clearly demonstrates that there were two agreements.

42. It follows that we do not accept either Mr Bowers' general submission about the effect of the totality guideline or as to the particular issue which arose in this case. In our judgment, the judge, having expressly considered totality and adjusted his overall sentence to take account of the need to maintain a just and proportionate sentence, achieved his end such that the overall sentence was not manifestly excessive.

43. For those reasons we refuse the renewed application for leave to appeal against the sentences on the indicted offences.

44. We can deal with contempt very briefly. In the course of his sentencing remarks, the judge referred to the sum dissipated as something over £200,000, rather than the figure in the

agreed basis of plea. That was an error. But it did not affect the assessment of the gravamen of the contempt, which was continued for many months, even after the appellant had been summonsed for contempt. The judge's categorisation of the offence was appropriate. We see nothing wrong in the sentence imposed for that offence.

45. Accordingly, we dismiss the appeal against the sentence in relation to contempt.
